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Nos. 84-495 and 84-1379

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

RICHARD THORNBURGH, ET AL., APPELLANTS
v.
AMERICAN COLLEGE OF OBSTETRICIANS AND
GYNECOLOGISTS, ET AL.

EUGENE F. DIAMOND, ET AL., APPELLANTS
v.
ALLAN G. CHARLES, ET AL.

ON APPEAL FROM
THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND SEVENTH CIRCUITS

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE -- WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES, CALIFORNIA; CALIFORNIA WOMEN LAWYERS; THE WOMEN'S BAR ASSOCIATION OF ILLINOIS; THE FLORIDA ASSOCIATION OF WOMEN LAWYERS; FLORIDA ASSOCIATION OF WOMEN LAWYERS, DADE COUNTY CHAPTER; AND CALIFORNIA LAWYERS FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENTS AND AMICUS BRIEF

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Women Lawyers' Association of Los Angeles, California; California Women Lawyers; the Women's Bar Association of Illinois; the Florida Association of Women Lawyers; The Florida Association of Women Lawyers, Dade County Chapter; and California Lawyers for Individual Freedom respectfully move this Court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorneys for respondents and one of the appellants herein has been obtained, but the attorneys for the remaining appellant herein refused to consent to the filing of this brief.

Applicants have an interest in this case because they are organizations that have professional women

as members, that have women as clients, and that are concerned with protecting the constitutional rights of women in society. Applicants and their members are personally and professionally concerned with the importance of preserving a woman's right to decide whether to terminate a pregnancy because pregnancy may adversely affect a woman's health, her life plans, the welfare of her family, and the welfare of unwanted children.

The attached brief responds to the arguments made by the Solicitor General of the United States in his amicus brief filed in support of respondents. Applicants believe

that the Solicitor General's arguments will not be adequately addressed by the respondents. If applicants' argument is approved by this Court, the decisions of the Appellate Courts below must be affirmed.

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INTEREST OF AMICI CURIAE

Amici curiae are state or local bar organizations having as members female and male lawyers and judges who are concerned with the special problems faced by women. California Lawyers for Individual Freedom is an organization of attorneys in the San Francisco area concerned with the preservation of personal liberties under the Constitution.

Amici and their members are personally and professionally concerned with the importance of preserving a woman's right to decide

whether to terminate a pregnancy because, as this Court found in Roe v. Wade, 410 U.S. 113, 153 (1973), pregnancy may adversely affect a woman's health, her life plans, the welfare of her family, and the welfare of an unwanted child. Amici therefore submit this brief in response to the amicus curiae brief submitted by the Solicitor General of the United States.

SUMMARY OF ARGUMENT

The Solicitor General's argument that there is no fundamental constitutional right to choose whether to terminate a pregnancy is

untenable and unfounded. The doctrine of stare decisis requires reaffirmance of the holding in Roe v. Wade, which recognized that right. The right to choose to terminate a pregnancy is a fundamental right concerning a private decision about family matters that is clearly protected by the Due Process Clause of the Fourteenth Amendment. It is a well-established principle of constitutional law that any state regulation of such a fundamental right is subject to strict scrutiny and must be justified by a compelling state interest where the regulation impinges on the individual's right. In applying this test, the

state interest must be defined in a way that does not violate the Establishment Clause of the First Amendment. Finally, public policy and opinion support the Court's continued recognition of the constitutional right to reproductive choice.

ARGUMENT

I. INTRODUCTION.

In an amicus curiae brief in this action, the Solicitor General has urged this Court to overturn its decision in Roe v. Wade, 410 U.S. 113 (1973), holding that a woman has a fundamental right to decide whether to terminate a pregnancy, and, by

implication, the score of its decisions which have accepted and applied Roe v. Wade.

Only two years ago the Court reviewed and explicitly reaffirmed Roe v. Wade in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). In fact, in Akron the Court not only approved Roe v. Wade, but also clearly reaffirmed that a woman's right to choose whether to terminate a pregnancy is a fundamental constitutional right and, therefore, any state regulation of it is subject to strict scrutiny.

The Solicitor General would take away a woman's right to

choose whether to terminate her pregnancy and instead interject governmental control into our most personal and private decisions. Adoption of the Solicitor General's position would result in a return to the days of unsafe, illegal abortions for women unable to endure a harmful or unwanted pregnancy.

Amici curiae believe that every person has a constitutional right to be free from the intrusion of the government into his or her most intimate personal decisions, and that this right clearly encompasses a woman's right to choose what will happen to her own body and, indeed, her own life. In this

brief, amici curiae will demonstrate that the decisions in Roe v. Wade and Akron should be reaffirmed not only on the basis of stare decisis, but also on the ground that they were correctly decided in the first instance. Amici urge the Court to once again reaffirm what has become a long line of decisions recognizing and protecting a woman's right to reproductive choice.

II. STARE DECISIS REQUIRES THAT ROE V. WADE BE REAFFIRMED.

The Solicitor General urges the Court to ignore the doctrine of stare decisis as applied to a woman's well-recognized constitu-

tional right to decide whether to terminate her pregnancy. This position underrates the strength and significance of the doctrine of stare decisis, particularly as applied to this Court's decision in Roe v. Wade.

A. Reaffirmance of Roe v. Wade Will Promote Stability, Judicial Efficiency and Public Faith in the Judicial System.

This Court has explained the purpose and importance of the doctrine of stare decisis by saying:

> "Very weighty considerations underlie the principle that Courts should not lightly overrule past decisions.

> Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970).

In light of these guidelines, this Court's determination to respect stare decisis by reaffirming Roe v. Wade barely two years ago in Akron has special significance for the present case. In Akron, as here, this Court was asked to overrule its decision in Roe v. Wade on the asserted ground that the Court had erred in interpreting the Constitution. 462 U.S. at 419. In rejecting that request and reaffirming Roe v. Wade, this Court recognized "especially compelling reasons for adhering to stare decisis in applying the principles of Roe v. Wade."

First, Roe v. Wade was carefully considered and was decided only after twice being argued and extensively briefed. Second, Roe v. Wade was decided by seven justices, including the Chief Justice. Third, since Roe v. Wade was decided, the Court has repeatedly and consistently accepted and applied its basic principle that a woman has a fundamental right to make the highly personal choice whether to terminate her pregnancy. 462 U.S. at 420 n.1.[1]

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1 Roe v. Wade has been extensively relied upon not only by this Court but also by the lower federal (Continued)

As a result of this Court's consistent action and as a matter of personal conviction, most Americans believe that a woman should have a right to make that decision.[2] Were the Court to withdraw its long standing recognition of that constitutional right, the ability of all citizens to rely on this Court's decisions as a guide to their conduct would be seriously undermined. That uncer-

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courts and by the courts of the various states. For example, Shepard's United States Citations through July of 1985 contains more than five pages of judicial citations to the decision.

2 See infra at V.

tainty will be avoided and the interests of stability, judicial efficiency, and public faith in the judicial system will be served if the Court adheres to stare decisis and once again reaffirms Roe v. Wade.

B. The Solicitor General Fails to Meet The Heavy Burden Necessary To Overrule Roe v. Wade.

Because of the important policies behind the doctrine of stare decisis, a litigant who asks this Court to disavow one of its precedents bears a heavy burden. As the Court stated in Thomas v.

Washington Gas Light Co., 448 U.S. 261, 272, (1980):

> "That doctrine [of stare decisis] not only plays an important role in orderly adjudication; it also serves the broader societal interests in evenhanded, consistent and predictable application of legal rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force." (footnotes omitted).

Acknowledging the continued viability of this holding, this Court recently repeated warnings that even in constitutional cases,

"any departure from the doctrine of stare decisis demands special justification." Garcia v. San Antonio Metropolitan Transit Authority, _____ U.S. _____, 83 L.Ed.2d 1016, 1039, 105 S.Ct. 1005 (1985) (Powell, J., dissenting); Arizona v. Rumsey, _____ U.S. _____, 81 L.Ed.2d 164, 172, 104 S.Ct. 2305 (1984); Oregon v. Kennedy, 456 U.S. 667, 691-692 n. 34 (1982) (Stevens, J., concurring).

In view of the strength of the stare decisis doctrine and the importance of the policies the doctrine promotes, the Solicitor General has a heavy burden indeed to justify reversal of 12 years of judicial, medical and social adherence to Roe

v. Wade. The Solicitor General's task is all the more difficult because only two years ago in Akron this Court considered and rejected this position.

In an attempt to avoid this burden, the Solicitor General argues that continued attacks on Roe v. Wade and Akron indicate that the analytical framework of the cases is arbitrary and unworkable. Solicitor General's Brief at 16-30. Such arguments have no place in constitutional law. A vocal or influential minority should not be able to determine the extent or quality of fundamental rights merely by continued efforts to restrict the

rights of individuals at the instance of the legislative or executive branches of government.

In fact, the framework set forth in Roe v. Wade is neither arbitrary nor unworkable. Legislative bodies can easily deal with changing medical capabilities by framing legislation in terms of, for example, viability of the fetus, and by restricting the right after that point but not before. Similarly, regulations concerned with maternal health can be made more restrictive at the stage of a woman's pregnancy when, in the opinion of her physician, the risk of undergoing an abortion is increased. The diffi-

culty in this area lies not with the standards adopted in Roe v. Wade, but with the desire of many legislative bodies to regulate the medical decision to terminate a pregnancy to a much greater degree than other medical decisions.

As is demonstrated by the following review of the constitutional precedents on which Roe v. Wade is based, the Solicitor General's argument that a woman's right to terminate her pregnancy has no basis in the Constitution is equally ill-founded. Thus, the Solicitor General's arguments do not support the burden of proving that Roe v. Wade and Akron were incorrectly decided.

This Court is therefore urged to follow the principles of stare decisis and reaffirm its decisions in Roe v. Wade and Akron.

III. A WOMAN'S RIGHT TO CHOOSE WHETHER TO TERMINATE HER PREGNANCY IS A FUNDAMENTAL CONSTITUTIONAL RIGHT.

A. The Right to Reproductive Choice Is Grounded in the Right to Privacy In Family Matters.

In Roe v. Wade this Court held that the constitutional right of privacy encompasses a woman's right to decide whether to terminate

her pregnancy. The recognition of this right has been repeatedly reaffirmed in a long line of cases decided by this Court since Roe v. Wade, most recently Akron.[3] None-

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3 Doe v. Bolton, 410 U.S. 179 (1973); Bigelow v. Virginia, 421 U.S. 809 (1975); Connecticut v. Menillo, 423 U.S. 9 (1975); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Singleton v. Wulff, 428 U.S. 106 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Whalen v. Roe, 429 U.S. 589 (1977); Carey v. Population Services International, 431 U.S. 678 (1977); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979); Williams

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theless, the Solicitor General now chooses to challenge the historical and constitutional basis of that decision. Solicitor General's Brief at 24-29.

The constitutional foundation of Roe v. Wade evolved over the last half century from this Court's

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v. Zbaraz, 442 U.S. 1309 (1979); Harris v. McRae, 448 U.S. 297 (1980); H.L. v. Matheson, 450 U.S. 398 (1981); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, 462 U.S. 476 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983).

recognition of the fundamental nature of human interests relating to marriage, procreation and family. As early as the 1920's, this Court acknowledged that an individual's right of privacy embraced a general interest in avoiding disclosure of personal matters. In Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925), the Court upheld the rights of parents to direct the upbringing and education of their children free from unreasonable restraints. In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court recognized that the principles embodied

in Meyer and Pierce concern "the private realm of family life, which the state cannot enter." Id. at 166.

The Court soon recognized that a necessary corollary to the constitutionally protected right to control the upbringing and education of one's children is the right to determine when and whether to bear children. Thus, in Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court invalidated a state's compulsory sterilization law. The Court's recognition of the basic liberty interest in reproductive autonomy was based in part upon a distrust of the arbitrary manner in which government control over reproductive

matters might be exercised if the choice of begetting a child were transferred from the individual to the state. Id. at 541.

Recognition of the constitutional right to reproductive autonomy was further broadened in Griswold v. Connecticut, 381 U.S. 479 (1965), where a state statute prohibiting the use of contraceptives was declared an unconstitutional infringement of the rights surrounding the marital relationship. The Court recognized a right of marital privacy "older than the Bill of Rights -- older than our political parties,

older than our school system." Id. at 486.[4]

Acknowledging its fundamental nature, this Court extended Griswold's protection of a married person's right to practice contraception to include unmarried persons in Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court concluded that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affect-

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4 See also Loving v. Virginia, 388 U.S. 1, 12 (1967).

ing a person as the decision whether to bear or beget a child." Id. at 453 (emphasis in original).

Thus the right to reproductive choice, including the right to terminate a pregnancy, has long been recognized as a fundamental constitutional right, and is firmly grounded on a sound constitutional basis.

B. The Right to Reproductive Choice is Grounded In The Fourteenth Amendment.

Contrary to the Solicitor General's assertion that the decision in Roe v. Wade constitutes an "abrupt departure from the Court's prior decisions," Solicitor General's Brief at

28, Roe v. Wade was "based firmly on this long recognized and essential element of personal liberty." Akron v. Akron Center for Reproductive Health, 462 U.S. at 427. Prior to Roe v. Wade, the Court had long recognized the constitutional foundation of the right of privacy, finding its locus in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 116 U.S. 616 (1886), see Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connec-

ticut, 381 U.S., at 484-485; in the Ninth Amendment, id., at 486-87 (Goldberg, J., concurring); and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

Thus, rather than abruptly departing from prior decisions, Roe v. Wade merely settled the locus of the long-recognized right by determining that, at least insofar as it encompasses reproductive choice, the right of privacy is "founded in the Fourteenth Amendment's conception of personal liberty and restrictions upon state action, [which] is broad enough to encompass a woman's deci-

sion whether or not to terminate her pregnancy." Roe v. Wade, 410 U.S. at 153. The Court's recognition of the right of privacy as an element of due process liberty rather than as an independent source of constitutional protection in the shadows or penumbras of the Bill of Rights is not a departure from prior cases, but merely a natural resolution of historical precedents. See Akron, 462 U.S. at 426; Whalen v. Roe, 429 U.S. 589, 598-599 n. 23 (1977).

The variety of the sources previously cited by the Court to support the existence of a fundamental right of privacy does not support a claim that it does not exist

at all, but shows the pervasive constitutional basis of the right. In the final analysis, the importance of the Court's recognition of such an essential right as that of an individual's privacy ultimately overshadows the Court's struggle in previous cases to pinpoint its locus.

The Solicitor General also denigrates the substantive due process foundation of Roe v. Wade, contending that it resurrects the era of Lochner v. New York, 198 U.S. 45 (1905). But the Lochner-era cases, which dealt primarily with state regulation of economic interests, are demonstrably different from cases concerning an individual's

autonomy in the exercise of reproductive rights. The fundamental nature of the right to privacy with respect to procreation in general, and the right to choose abortion in particular, demands that a greater degree of protection be afforded under modern substantive due process analysis and readily distinguishes these cases from those concerned with economic interests. See, e.g., Loving v. Virginia, 388 U.S. 1, and Shapiro v. Thompson, 394 U.S. 618 (1969).

C. The Right To Reproductive Choice Is Also Protected By The Establishment Clause Of The First Amendment.

The Solicitor General suggests that the Court in Roe v. Wade did not give sufficient consideration to the fetus as a human life. Solicitor General's Brief at 22-23. But this very question has philosophical, religious and medical elements for which there has been no substantial consensus in this country

-- now or at the time Roe v. Wade was decided.[5]

Legislation regulating abortion necessarily requires a legislative determination of the philosophical and religious question of when human life begins. To analyze this question as if the fetus has "life" from the moment of conception would be to permit the legislatures or courts to make a

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5 Tribe, The Supreme Court 1972 Term -- Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv.L.Rev. 1, 13 (1972); Mehren, A Refutation of 'Silent Scream,' Los Angeles Times, Aug. 17, 1985,
(Continued)

philosophical and religious decision which is reserved to the conscience of each individual under the First Amendment. The Establishment Clause's proscription against state entanglement in religion would be violated if the legislature were able to define the beginning of life in order to regulate a woman's right to terminate a pregnancy. For this reason, it was not only appropriate but constitutionally mandatory for the Court in Roe v. Wade to give little credence to a so-called state

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Part V, at 1, col. 4 (hereinafter "Mehren").

interest in the potential life of the fetus, until the time when the fetus can in fact exist apart from the pregnant woman.[6]

D. The Right to Reproductive Choice Is Consistent With The Historical Context of Early Anti-Abortion Statutes.

The Solicitor General's historical argument collapses into a single attack against the existence of a privacy right encompassing a

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6 Even now the scientific debate on that issue continues, with new evidence that fetal viability may not exist until as (Continued)

woman's right to choose whether to terminate her pregnancy. Solicitor General's Brief at 25-29. The Solicitor General asserts that the right to choose had not been recognized when the Fourteenth Amendment was drafted and adopted in 1868, citing then-existing statutes criminalizing abortion. Roe v. Wade's exhaustive analysis of historical data, however, clearly shows that those statutes differentiated between early and late abortions.

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late as the 28th week after conception. Mehren, supra note 5, at 7, col. 2.

Late Nineteenth Century abortion statutes evidently sought to protect the mother from the high abortion mortality rates caused by the hazardous medical techniques then in use, techniques which become more dangerous later in pregnancy. Thus, those abortion statutes penalized later abortions more severely. Roe v. Wade, 410 U.S. at 148-9, 151. Roe v. Wade and subsequent cases have recognized that with the improvement of medical technology, an abortion during the initial stages of pregnancy is now safer than normal childbirth. Id. at 149. Thus, the rationale for restricting a woman's privacy rights which might have been

relied upon in the Nineteenth Century, and on which the Solicitor General premises his argument, no longer exists.

In fact, the harm imposed on women today through the denial of the right to choose to terminate a pregnancy exceeds the physical risk associated with early abortions. As the Court observed in Roe v. Wade:

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future.

> Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved."

Roe v. Wade, 410 U.S. at 153.

This recognition of the medical benefits of abortion is entirely consistent with the historical treatment of the right to abortion

and lends historical credibility to the rule of Roe v. Wade.

IV. STATE REGULATION OF THE FUNDAMENTAL RIGHT OF REPRODUCTIVE CHOICE MUST BE STRICTLY SCRUTINIZED.

A. State Regulation of Any Fundamental Right Demands Strict Scrutiny.

The standard for evaluating the constitutionality of state regulation of constitutional rights was set forth in San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973):

> "We must decide, first, whether [state regulation] . . . impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose. . ."

This Court has consistently applied this strict scrutiny standard of judicial review to cases in which the state action touches upon fundamental rights. See Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Kramer v. Union Free School District, 395 U.S. 621 (1969). In these cases

the Court has repeatedly ruled not only that a fundamental right cannot be restricted without a compelling state interest, but that the state-imposed requirements must be closely tailored to effectuate only the compelling state interest. Zablocki, 434 U.S. at 388. If there are reasonable ways to achieve the state's legitimate and compelling interest with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it does act, it must choose the least drastic means. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

The Court established in Roe v. Wade that a woman's funda-

mental right to choose whether to terminate a pregnancy must be judged by the same strict standard of judicial scrutiny as other fundamental rights. Roe v. Wade, 410 U.S. at 427. Since Roe v. Wade, the Court has consistently applied the strict scrutiny analysis to state attempts to regulate a woman's right to choose to terminate a pregnancy. For example, in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), the Court found that in the absence of a compelling state interest, the state cannot regulate or proscribe abortion. Similarly, in Maher v. Roe, 432 U.S. 464, 470, (1977), the Court specifically

applied the San Antonio School District standards quoted above to a state's attempt to regulate the right to reproductive choice.

B. Regulations That Impinge On The Fundamental Right To Reproductive Choice Cannot Withstand Strict Scrutiny.

In evaluating the constitutionality of state regulation of fundamental rights, a court must begin by determining whether the regulation impinges on the right. If it does, the statute is subject to strict scrutiny. Maher v. Roe, 32 U.S. at 470.

During the 12 years since Roe v. Wade was decided, the Court has evaluated numerous state attempts to regulate abortion. An analysis of these decisions reveals that state regulations impinge on the right to reproductive choice when they increase the costs of an abortion, require third party participation in the decision, or treat abortion differently from other medical procedures.

Thus, in Doe v. Bolton, 410 U.S. 179 (1973), the Court struck down a Georgia statute requiring abortions to be performed in hospitals because it impinged on a woman's right to reproductive choice

by increasing the cost of the procedure. Similarly, regulations have been held to illegally impinge on this right when they require a lengthy and inflexible recitation of information by the woman's physician, rather than by a trained counselor who could provide the same information at a lower cost. Akron, 462 U.S. at 445. This Court also concluded in Akron that regulations requiring a waiting period between a woman's submission of a signed consent form and the performance of the abortion impinged on the right to reproductive choice by the unwarranted additional cost of a second trip to the woman's physician. Id., at 450-51.

In Danforth, the requirement of spousal consent to a woman's decision to terminate her pregnancy was found to illegally impinge on her right to reproductive choice by fettering that right with the influence of third parties. For the same reason, in Bellotti v. Baird, 443 U.S. 622 (1979), a Massachusetts statute requiring the consent of a pregnant minor's parents before an abortion could be performed was found to impinge on the right of mature minors. Similarly, in Akron the Court found a presumption that all minors under the age of 15 were too immature to make that decision

without parental consent impinged on a mature minor's right to choose.

By comparison, the Court has approved regulations requiring that abortions be performed by a licensed, competent physician because those requirements are no more than would be required for any other operation. Roe v. Wade, 410 U.S. at 165; Connecticut v. Menillo, 423 U.S. at 10-11. As in other medical procedures, "informed consent" may be required, but information that "is designed not to inform the woman's consent but rather to persuade her to withhold it altogether" is prohibited. Akron, 462 U.S. at 444.

These decisions provide a clearly defined framework for scrutinizing state attempts to regulate a woman's exercise of her right to reproductive choice. They demonstrate that any statute which impinges on that fundamental right is constitutionally invalid unless there is a compelling state interest to justify it.

The Court has identified two legitimate state interests that underlie regulation of abortions: (1) preserving and protecting the health of the pregnant woman, which only becomes "compelling" when there is a greater risk of maternal mortality in abortion than in normal

childbirth; and (2) protecting the potentiality of life, which only becomes "compelling" when the fetus is capable of "meaningful life outside the mother's womb." Roe v. Wade, 410 U.S. at 154, 163. Neither interest is compelling in the first stage of pregnancy. Before state interests become compelling, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician without interference from the state. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 61, citing Roe v. Wade, 410 U.S. at 164.

If a regulation does not impinge on the fundamental right, rather than needing to show a compelling interest, the state must at least show a rational relationship between the regulation and its legitimate purpose. See, Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476 (1982) (pathology exam required for each abortion performed upheld as useful in protecting woman's health and standard in all medical procedures); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 62. While some regulations have no significant impact on a woman's exercise of her right to reproductive choice,

and may be permissible where justified by an important state health objective, if the regulation is not reasonably designed to further those objectives the statute will fail the test. See Akron, 462 U.S. at 431, 434. To the extent that a challenged regulation establishes requirements which do not serve a legitimate interest of the state, it is unconstitutional and no further scrutiny is required. Doe v. Bolton, 410 U.S. 179 (1973) (statute's requirement that two physicians concur in the abortion decision is without "rational" connection to any legitimate interest of the patient's needs).

Thus, the parameters of permissible regulation are narrow, and broad regulations unrelated to compelling and legitimate state objectives cannot survive strict scrutiny.

C. The Strict Scrutiny Standard Was Properly Applied in Akron.

In Akron, the Court applied strict scrutiny to the City of Akron's sweeping abortion ordinance and struck down all of its provisions except those which were found to have no significant impact on a woman's fundamental right to decide to terminate a pregnancy. Akron, 462 U.S.

416. Using the strict scrutiny standard of review, the Court invalidated a hospitalization requirement for second trimester abortions because it "placed a significant obstacle in the path of women seeking an abortion" and was not justified as a reasonable health regulation. Akron, 462 U.S. at 434. The Court employed the same reasoning to strike down Akron's informed consent requirement, holding that it was not narrowly related to a legitimate purpose and that its real purpose was to withhold the woman's consent altogether. Akron, 462 U.S. at 444. In addition, the Court struck down requirements that the attending physician recite a detailed list of

"facts" about fetal development and the risks of abortion. Akron, 462 U.S. at 448.

Most significantly, this Court explicitly rejected suggestions that it adopt a new standard that would drastically curtail the right to reproductive choice, and rejected one such suggestion repeated here by the Solicitor General: that the Court apply an "undue burden" standard of review regardless of trimester. Solicitor General's Brief in Support of Petitioners at 8, 18, Akron, 462 U.S. 416.

Thus, by a vote of 6-3 the Court confirmed its continuing commitment to the constitutional principles articulated in Roe v. Wade,

including the application of strict scrutiny to the evaluation of statutes affecting fundamental rights. Contrary to the Solicitor General's arguments, the Akron decision was not an "abrupt departure," but a continuing application of the strict scrutiny analysis of fundamental rights long utilized by this Court.

The clear message of Akron, a message that can be derived independently of but consistently with Roe v. Wade, is that a woman has the right to choose to terminate a pregnancy and any attempt to abridge that right must be strictly circumscribed.

V. PUBLIC OPINION SUPPORTS REAFFIRMANCE OF ROE V. WADE.

The Solicitor General argues that because there has been loud controversy among some segments of the population regarding the Roe v. Wade decision, legislatures should be permitted to arbitrarily regulate a woman's right to choose whether to terminate her pregnancy. This argument mischaracterizes both the "controversy" and the Court's role in it. Public opinion supports the Roe v. Wade decision.[7] Even if

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7 The November 1981 issue of LIFE magazine reported the results of a survey on the (Continued)

it did not, however, the Court's function is not to abdicate its role

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attitude of American women toward abortion and related issues. That study found that 67% of all women believed that any woman who chose to have an abortion should be permitted to obtain one legally. That proportion increased in specific situations: 72% favored legal abortion if the woman were a pregnant unmarried teenager; 86% if the woman were an incest victim; 87% if the woman were carrying a genetically defective fetus; 88% if the woman had been raped; and 91% if the woman's health were at risk. In a February 1984 Washington Post-ABC News poll, 61% of those polled indicated that a woman should be able to obtain an abortion should she desire one. ("What Americans Think," The Washington Post National

(Continued)

in the protection of individual rights because one segment of the population may wish to deprive the entire population of those rights.

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Weekly Edition, Mar. 12, 1984.) A 1984 Woman's Day survey found that 79% of its readers supported a woman's right to choose an abortion. ("What Women Voters Really Want," Woman's Day, Oct. 2, 1984.) A January 1985 ABC News Poll found that more than 50% of the American public now believe a woman has a right to abortion on demand. A majority thought the Roe v. Wade decision was "the right thing to do" and opposed a constitutional amendment to overrule it. Only 11% opposed abortion under all circumstances.

CONCLUSION

The foregoing discussion clearly demonstrates that both Roe v. Wade and Akron are firmly grounded on historical precedents and this Court's longstanding recognition of the fundamental right of privacy and the need to protect that right by strict scrutiny. Their reaffirmation is thus mandated not only by the doctrine of stare decisis, but also by sound constitutional principles. Amici therefore urge this Court to

reaffirm Roe v. Wade and its long line of progeny.

Respectfully submitted,

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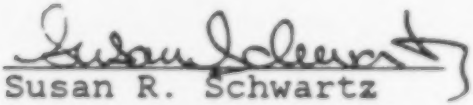

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA,
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I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within above entitled action; my business address is 333 South Hope Street, 38th Floor, Los Angeles, California 90071.

On August 30, 1985, I served the within AMICUS BRIEF IN SUPPORT OF RESPONDENTS on interested parties in said action by placing three true and correct copies thereof to each

of the parties, and one true and correct copy thereof to each of the amici, enclosed in a sealed envelope with air mail postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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